U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 April 2006

BALCA Case No.: 2005-INA-00159
ETA Case No.: 2003-CA-09540507/JS

In the Matter of:

PANADERIA Y PASTELERIA ENSENADA,
Employer,

on behalf of

JUAN GALVAN,
Alien.

Appearances: Ronald A. Marks, Esquire
Santa Ana, California
For the Employer

Felipe Insalata, Agent
Santa Ana, California
For the Employer and the Alien[1]

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**[2]
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

[1] The request for BALCA review was submitted by Mr. Insalata. Employer's appellate brief was submitted by Mr. Marks.

[2] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

This case arises from an application for labor certification[3] filed by Panaderia y Pasteleria Ensenada ("Employer") on behalf of Juan Galvan ("the Alien") for the position of Baker. (AF 36).[4] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File, and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 16, 2001, Employer filed an application for labor certification to enable the Alien to fill the position of Baker. The position required two years of experience and six years of grade school. One resume was received from a U.S. applicant who listed experience as a baker from 1993-1999. (AF 51). The applicant listed a home address, telephone number, and an e-mail address on his resume.

Employer submitted the results of its recruitment efforts by letter dated December 30, 2002, stating that it had contacted the one applicant by certified mail, and submitting a copy of the letter sent. (AF 40). The letter reiterated the description of the position as set forth in the advertisement and advised the applicant that if he felt he had the experience required, "we would like to hear from you." A name to contact and telephone number were provided in order to schedule an interview. (AF 42). When the applicant received the certified mail and did not respond, Employer telephoned the applicant and left a message with the applicant's wife on December 7th. When there was still no contact from the applicant, Employer telephoned again on December 9th, at which time the applicant's father answered the telephone and a second message was left for the applicant. In both messages, Employer invited the applicant to contact employer for an interview, leaving her name and telephone number. The applicant failed to contact Employer and according to Employer, it could thus lawfully reject the applicant.

[3] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[4] "AF" is an abbreviation for "Appeal File."

The CO issued a Notice of Findings ("NOF") on October 1, 2004, proposing to deny certification, finding that there had been an unlawful rejection of a U.S. worker. (AF 32). Specifically, the CO found the one U.S. applicant who applied was qualified, as he had six years of experience as a baker. While noting that Employer found the applicant to be unavailable, the CO questioned whether Employer made sufficient attempts to contact and recruit this applicant. The CO noted that the return receipt was signed but that the photocopy obscured the date. In addition, the certified return receipt showed the Alien as the sender, there was no original receipt, and the CO was unable to determine if the return receipt was to go to Employer. Furthermore, the body of the letter provided a verbatim description of the job and invited the applicant to call the Employer if he felt that he had the experience. The letter had no signature and there was no other information, such as the name of the Employer.

The CO found that with the documentation provided to date he was unable to determine who sent the certified letter, who signed the letter, or the receipt date of the letter. There was a concern about whether the Alien and/or his representative were involved in sending the certified letter. The CO also pointed out that the content of the letter was laborious in its rendition of the job duties, and the suggestion that if the applicant felt he was qualified he could call was less than inviting, when the applicant had already submitted a letter showing that he was qualified. The CO also found that the statement that messages had been left with family members did not show whether the applicant had already received the letter and whether Employer could determine that the messages were being left for someone who had received the letter.

In order to rebut these findings, Employer was directed to explain who sent the certified letter to the applicant. A full copy of the letter was requested, as well as the original return receipt, showing the date the letter was received and to whom the receipt was returned. Employer was directed to provide all of the information left in the telephone messages and a copy of the telephone bill, showing the telephone calls made and their length.

By letter dated October 20, 2004, Employer submitted rebuttal. (AF 21). Included in the rebuttal were the original return receipt, an Applicant Contact and/or Interview Questionnaire,

and a copy of the contact letter. Employer pointed out that it was not required to contact applicants by certified mail and that certified mail is preferable to a telephone call. Employer contended that return receipts are adequate documentation that an applicant was contacted, and even though Employer was not required to follow-up with the applicant, it did. Employer submitted more detail regarding the attempts to contact the applicant, claiming that the telephone call with the applicant's wife lasted approximately four minutes while the telephone call with the applicant's father lasted approximately five minutes.

Employer contended further that Employer's representative, Unicenter Inc., contacted the applicant within the time established by the Employment Development Department ("EDD"). Employer stated that the contact letter did mention Employer's name and that neither the Alien nor Employer's representative participated in the recruitment of U.S. workers. While the certified mail receipt showed the name of the Alien on top, this was due to an internal procedure of the Employer's representative office, wherein the alien's name was written down to facilitate the filing of the receipt once received. According to Employer, the Alien never contacted the applicant nor did he send the letter.

A Final Determination denying certification was issued on December 13, 2004. (AF 15). The CO determined that Employer's rebuttal did not overcome the less than inviting nature of the letter, and while rebuttal established that it was not the Alien who sent the contact letter, it indicated that the agent for labor certification, not Employer, sent the contact letter.

The CO further found that Employer was correct that there was no specific form of contact required; however, the CO concluded that a possibly discouraging letter from the agent, as in this instance, did not demonstrate an adequate attempt to recruit. The CO determined that Employer's response indicated that it left only short messages with the applicant's family members. The CO found further that the statements made regarding the length of the telephone calls were not supported by Employer's account of the content of those messages or by any telephone bill records. After reviewing all of the information of record, the CO determined that Employer had not made sufficient attempts to contact and recruit this applicant and denied certification.

On December 30, 2004, Employer filed what it titled a Request for Review of Denial of Certification. (AF 4). The matter was then forwarded to the Board of Alien Labor Certification Appeals ("Board"). The Board docketed the case on June 9, 2005.

DISCUSSION

In its Request for Review of Denial of Certification dated December 30, 2004, which was addressed to the CO, Employer requested that the CO reconsider the final decision of denial, stating that Employer believed that the case it had presented raised matters for a motion to reconsider. The CO did not rule on this request for reconsideration. Where an employer timely files a motion of reconsideration, the CO must formally rule on the motion. *Charles Serouya & Son, Inc.*, 1988-INA-261 (Mar. 14, 1989) (*en banc*). The CO is required to "state clearly whether he has denied an employer's request for reconsideration, *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*), or has granted the request and, upon reconsideration, affirmed his denial of certification." *Richard Clarke Associates*, 1990-INA-80 (May 13, 1992) (*en banc*). Employer herein filed a timely request for reconsideration. Since the CO did not rule on the motion to reconsider, we will draw the inference that the CO fully considered the motion and denied it. All arguments made in the motion, therefore, will considered to have been before the CO when the application was denied and in the record for consideration by this Board on review.

In *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (en banc), the Board held that in order to establish that it recruited in good faith an employer must establish that it undertook reasonable efforts to contact U.S. applicants, rather than provide proof of actual contact. In *M.N. Auto*, the Board held that an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith, even if it cannot produce certain types of documentation, and that a CO may not summarily discard an employer's assertions about the efforts made to contact applicants, although a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

In the instant case, the sole U.S. applicant's resume clearly shows that he was qualified for the job. (AF 51). Employer used certified mail to contact this applicant. Although the certified mail receipts were partially obscured in the photocopy presented with the recruitment report (AF 42), the photocopy presented with the rebuttal clearly shows that the letter was received (AF 28). The signature on the PS Form 3811 is almost illegible, but appears to be consistent with the applicants' name. Thus, it appears that the applicant had actual receipt of the Employer's contact letter. The Employer timely made two attempts at follow-up telephone calls, which were documented in an "Applicant Contact and/or Interview" Form. (AF 27). The Employer also provided a reasonable description of the attempts to contact the applicant in the rebuttal letter. (AF 7-8). Employer was only able to leave messages with family members. None of these contacts produced a response from the U.S. applicant.

If the Employer had merely sent the certified letter, or had merely left a single telephone message with a family member, we may have affirmed the CO's conclusion that the Employer had not documented adequate efforts at contacting the applicant. However, in the instant case Employer appears to have made an actual contact with the applicant and then made two telephonic attempts to follow-up. We find that these efforts support a finding of good faith recruitment.

The CO also cited the purportedly discouraging nature of Employer's letter to the applicant. We do not draw the same conclusion. The letter repeated the description of the job and invited an interview if the applicant believed that he had the required experience. The CO was concerned that the applicant obviously already believed that he was qualified, or he would not have applied for the job in the first place. What the letter said, however, was "[i]f you feel you have the experience required we would like to hear from you. You can call [the Employer's General Manager] ... to schedule an interview." We not find that this language would have discouraged a qualified and interested applicant from calling to schedule that interview. We also note that the letter identified the Employer, and that it was about its advertisement in the Los Angeles Times. Although the CO found it significant that the Employer's agent mailed the contact letter, we accept Employer's argument in the motion for reconsideration/request for

Board review and in its appellate brief that nothing in the documents received by the U.S. applicant would have revealed that an immigration firm or agent had sent the letter. Although the regulations provide that the alien's agent or attorney may not interview or consider U.S. applicants unless the agent or attorney is also the employer's representative who normally interviews or considers applicants for job opportunities such as that offered, 20 C.F.R. § 656.20(b), there is no reason in the instant application to draw the conclusion that the U.S. applicant was discouraged from scheduling an interview because the Employer and Alien's agent mailed the contact letter or that the agent actually participated in interviewing the applicant.

We find that the documentation of record establishes that Employer's overall recruitment efforts were in good faith and that it did not unlawfully reject the U.S. applicant. Rather, the U.S applicant was unresponsive and had apparently lost interest in interviewing for the position.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby **REVERSED** and this case is **REMANDED** for the purpose of the Certifying Officer issuing the labor certification.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals

800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.